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Supreme Court of the United States

October Term, 1970

No. 1075

ROBERT VIGGIANO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY MEMORANDUM OF PETITIONERS

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APPENDIX

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Reply Memorandum of Petitioner

The petitioner Viggiano submits this memorandum in reply to the answering memorandum of the Solicitor General.

The opinion of the Court of Appeals is now reported at 433 F.2d 716 (CA-2, 1970).

The government memorandum (page 4) does refer to a related issue case, United States v. Harris, No. 30, October 1970 term, certiorari granted, 397 U.S. 905 (2/24/70).

In Harris the Court of Appeals for the Sixth Circuit (412 F.2d 796) held insufficient an affidavit submitted in support of a search warrant, where the affidavit did not recite that the informer was previously reliable, and merely referred to the informer as a "prudent person." The Court of Appeals did not consider it legally significant that the informer stated he personally had purchased illicit whisky for more than two years from the defendant, and as recently as two weeks, and that he knew another person who purchased illicit whisky from the defendant the past two days.

Nor did the Court of Appeals in Harris attach any weight to the affidavit recitation that the defendant had a reputation for dealing in illicit whisky, and that a constable had in the past located a cache of whisky in premises under the defendant's control. As such, the inability of the federal agents to corroborate in a substantial way by personal knowledge or observation, the informer's leads could not overcome

the legal obstacle that the informer was not previously reliable. Nor did the Court of Appeals attach any weight to the admission against interest of the informer that he regularly purchased illicit whisky — that this made him an aidor and abettor.

It was the Solicitor General (not the defendant) who petitioned for certiorari claiming that the principles of Aguilar and Spinelli were not properly applied by the Court of Appeals (Harris Petition, page 4). And it was the Solicitor General who asserted that the Supreme Court should clarify the law to hold that an informer need not be previously reliable, as long as the corroboration is substantial (Harris Petition, pages 4-5).

It is ironic that the Solicitor General, having successfully secured certiorari in Harris as a case worthy of clarification of the legal issue of the use of information supplied by a non-previously reliable informer, should seek to avoid the identical issue in this case (Viggiano) by asserting that no two cases present the identical facts. The legal issue presented is identical — it is immaterial that the peculiar facts of each case are different.

In its certiorari petition in Harris, the Solicitor General, in stressing the importance of the issue, and the need for clarification, stated (pp. 4-5, 8):

> "Here the only issue is whether the affidavit in question sufficiently established the credibility of the informant. In the past the Court has recognized that an inform-

ant's credibility may be established by showing (1) that he has previously given information that proved reliable (see McCray v. Illinois, 386 U.S. 300) or (2) that the information given the informant was corroborated by the investigation of the law enforcement officers involved (see Draper v. United States, 358 U.S. 307). We ask the Court to grant review in this case because it presents the important question whether these are the exclusive means for establishing the credibility of an informant or whether there are other rational criteria which a magistrate may consider in determining whether what the informant said should be credited.

"We believe there are circumstances in which a magistrate should be allowed to issue a warrant on the basis of information supplied by a person who has never before provided information to the police."

* * *

"While the particular offense here involved is not of great significance, the principle at stake is. A lead in solving a very serious crime may come from a person who has not previously given information. Law enforcement officers ought to be able to act on such information, even though the informer is unwilling to reveal his identity, when his information is specific, when he is willing to swear to the truth of his statements, when the officer is willing to swear that he found the informer credible, and

> when the information is consonant with other facts known to the law enforcement officers concerning the subject's reputation and activities."

Again in its brief in Harris, the Solicitor General stated (pp. 13-14):

> "Indeed, it is this aspect of the lower court's opinion which most concerns the government, and which occasioned our request for certiorari in this case. In the past, this Court has recognized that an informant's reliability may be established by showing that he has previously given information that proved reliable. See McCray v. Illinois, 386 U.S. 300. We believe, however, that there are circumstances in which a magistrate should be allowed to issue a warrant on the basis of information supplied by a person who has never before provided information to the police."

As such it hardly seems appropriate for the Solicitor General to suggest that Viggiano does not present a cert-worthy issue. After all both the sovereign and his subjects are bound by the same law.

The opinion of the Second Circuit in this case is contrary to the opinion of the Sixth Circuit in Harris. The issue is substantial — this Court did grant certiorari in Harris. And clarification is in order, for this Court has yet to say that an informer need not be previously reliable.

It is significant to note that the Solicitor Gen-

eral has not attempted to dispute the basic legal thrust of this petition — "to date this Court has never found probably cause based upon a statement from a not previously reliable informer, where the law enforcement officer did not himself observe either the defendant in question, or the contraband, or the premises" (Petiton, p. 8). Nor did the Solicitor General in either its Harris petition or its Harris brief refer to a single case of this Court which would contradict this statement as to the state of the law. In fact in its Harris brief (p. 12), the Solicitor General, in advancing an alternative position, hedged — "But even if we assume that the reliability of the informer test suggested in Aguilar is fully relevant here, . . ." In view of this argument we can hardly say that the law does not require some clarification.

Conclusion

It is requested that the Court set this matter for oral argument along with Harris,[1] or postpone decision on this petition until Harris is decided.

Respectfully submitted,

JEROME LEWIS
Counsel for Petitioner

H. ELLIOT WALES
On the Brief

---

1. The respondent's brief in Harris is due January 28th. Apparently, the appeal may be scheduled for oral argument during the session commencing March 22nd.

Form A. O. 93 (Revised Oct. 1939) SEARCH WARRANT Search Warrant

United States District Court

FOR THE

EASTERN DISTRICT OF NEW YORK

Commissioner's Docket No. 16

Case No. 120

UNITED STATES OF AMERICA

v.

The ground floor of a two story brick dwelling located at 9031 Farragut Road, Brooklyn, N.Y.

SEARCH WARRANT

To Special Agents of the Federal Bureau of Investigation

Affidavit having been made before me by Paul Stapleton, Special Agent Federal Bureau of Investigation

that he {has reason to believe / is positive} that {on the person or on the premises known as} on the ground floor of a two story brick dwelling, located on the north side of Farragut Road, between East 92nd Street and Remsen Avenue, and numbered 9031 Farragut Road, New York in the Eastern District of New York

there is now being concealed certain property, namely a quantity of cartons of "Russtogs" Inc., ladies sportswear, slacks, skirts and

which are goods stolen from the Russtogs Inc., of Long Island, New York while moving in interstate commerce, from the depot of the Max Miller Trucking Co., and said goods were stolen on or about September 30, 1968, in violation of Title 18, United StatesCode, Section 659.

[here give alleged grounds for search and seizure]

and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the {person / premises} above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the {person / place} named for the property specified, serving this warrant and making the search {in the daytime / at any time in the day or night} and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 24th day of October, 19 68

Gerard T. McGuire, Special Attorney
Department of Justice
U.S. Courthouse, Brooklyn, N.Y.

U. S. Commissioner

G3-Pm

[Federal Rules of Criminal Procedure provide: "The warrant shall direct that it be served in the daytime, but if the affidavits ... positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time." Rule 41(c)]

Search Warrant

RETURN

I received the attached search warrant October 24 , 19 68 , and have executed it as follows:

On October 25 , 19 68 at 10:20 o'clock AM. I searched [the person / the premises] described in the warrant and

I left a copy of the warrant with in garage.
(Name of person searched or owner or "at the place of search")

together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

1-Open carton showing shipment from Russ Togs, Inc., 27-11 49th Ave., Long Island City, New York consigned to B. Forman (Main) 45 Clinton Avenue, South Rochester, N.Y. Label on carton reflected invoice number 99R906, dated 8/16/68, Department 381, account #1022. Carton contained women's sweaters, styles 1999 and 3518.

3-Open cartons showing shipment from Russ Togs, Inc., 27-11 49th Ave., Long Island City, N.Y. consigned to Potomac Merchandise, 12100 Park Lawn Drive, Rockville, Maryland. Marked on cartons in black crayon # 48073. Cartons contained women's nylon stretch pullover blouses and/or sweaters, style 1561 in assorted colors.

1-Open carton showing shipment from Russ Togs, Inc., 27-11 49th Ave., Long Island City, N.Y. Dept. W302 consigned to Gimbels (South Hills) Pittsburgh, Pennsylvania. Marked in black crayon "via Steel City, WT06, 00R522." Carton contained women's slacks, hangtag reflecting lot 4619, 8688, WPL 6250 and women's skirts, hang tags reflecting lot 4632, 8686, WPL6250.

Also found in garage:

3-Women's ski jackets (shell liners) bearing Russ Togs hang tags, style 3312, WPL 6250, lot 4252, 20 women's 3/4 length fingertip car coats

This inventory was made in the presence of

Special Agent Monkman
and

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

[signature]

Subscribed and sworn to and returned before me this 4th day of November , 19 68 .

[signature]
United States Commissioner

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U.S. DISTRICT COURT E.D. N.Y.

★ FEB 10 1969 ★

TIME A.M.
P.M.

Search Warrant

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

the ground floor of a two story brick dwelling located at 9031 Farragut Road, Brooklyn, New York

AFFIDAVIT

T. 18, U.S.C. § 659

EASTERN DISTRICT OF NEW YORK, SS:

Paul Stapleton, being duly sworn, deposes and says that he is a Special Agent of the Federal Bureau of Investigation, duly appointed according to law, and acting as such.

Your deponent has reason to believe that there is being kept and concealed on the ground floor of a two story brick dwelling, located on the north side of Farragut Road, between East 92nd Street and Hensen Avenues, and numbered 9031 Farragut Road, and occupied by Allen Viggiano, his family and another tenant, a quantity of "Russtog" ladies sportswear, slacks, skirts and knitwear, which were stolen, from an interstate shipment of Russtogs merchandise between September 30, 1968 and October 1, 1968, from the Max Miller Trucking Company terminal, at 2214 37th Avenue, Long Island City, New York and which had been received by the said Trucking Company from Russtogs, Incorporated, 27-11 49th Avenue, Long Island City, New York, for shipment to various consignees outside of the State of New York, in violation of Section 659, Title 18, United States Code.

The grounds for your deponent's belief are as follows:

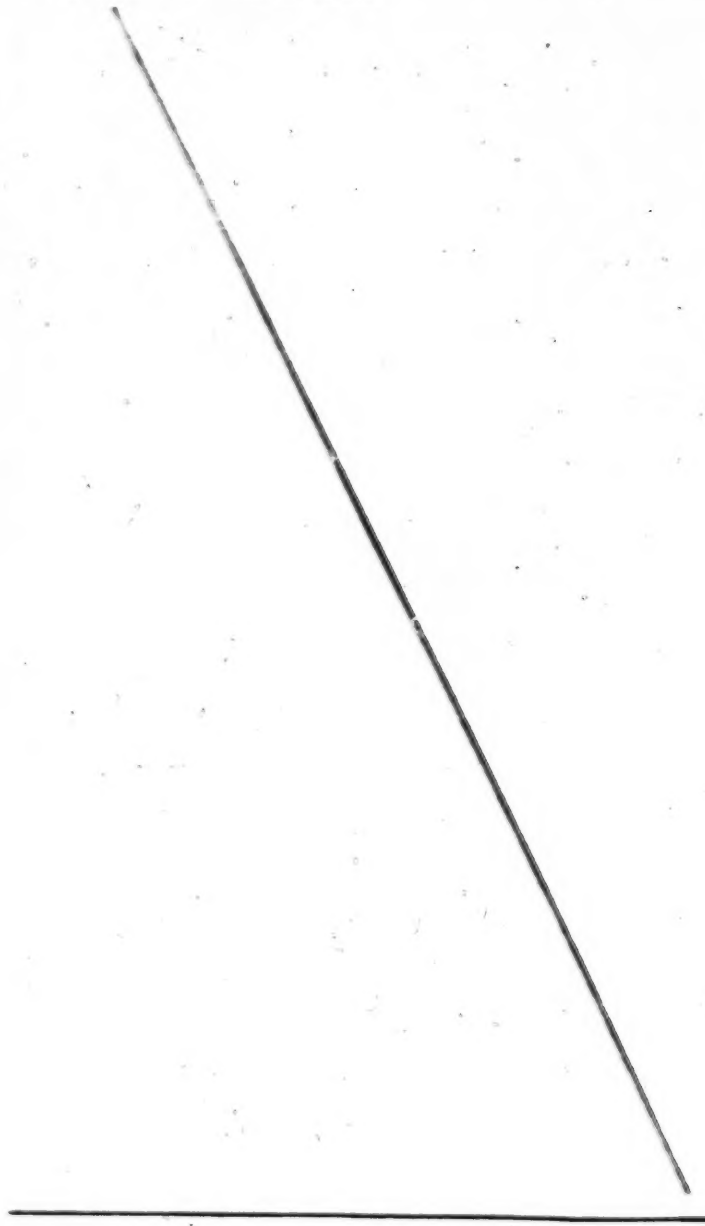
Search Warrant

1. Investigation by agents of the Federal Bureau of Investigation has disclosed that Max Miller Trucking Company reported a burglary of their premise, between the evening of September 30, 1966 and the morning of October 1, 1966, in which a quantity of Russtogs merchandise, valued in excess of One Hundred Dollars ($100.00), and received from Russtogs, incorporated, for shipment to various consignees outside the State of New York, and a quantity of other shippers wearing apparel received for interstate shipment, had been stolen from their shipping depot at 42-14 9th Avenue, Long Island City, New York, within the Eastern District of New York

2. Allen Magid informed me of the following: that he had a conversation with one Robert Viggiano in the early part of October 1966 in which Viggiano told him that he had received "another Russtog Load", that the said Viggiano showed him, in his garage, located at 292 East 92nd Street, a quantity of boxes bearing Russtogs labels and out of state addresses, and said "that's the load." That thereafter, on or about October 7, 1966 the said Robert Viggiano told Magid that he moved "the load" to his brother's house "around the corner." That the said Magid knows one Allen Viggiano, the brother of the said Robert Viggiano, and that Allen Viggiano lives "around the corner" from Robert Viggiano's house, in a two story, two family brick dwelling with a garage on the ground floor, on Farragut Road between East 92nd Street and Remsen Avenue, number 9031 Farragut Road. Further, that Magid was informed by Robert Viggiano that as recently as October 20, 1966 the merchandise was still in Allen Viggiano's house. Further that there is a garage and storage room on the ground floor of Allen Viggiano's house, that there is a tenant living on the first floor and that Allen Viggiano lives on the second floor. Further that Robert

Search Warrant

Viggiano told Magid that "the stuff" was right underneath the tenant. Magid said further that he would be told when the shipment moved from the premises described and he was not been so informed.



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Search Warrant

WHEREFORE, your deponent respectfully prays that a Search Warrant issue authorizing your deponent, and other Special Agents of the Federal Bureau of Investigation to enter in the daytime, with the proper assistance, the premises on the ground floor of a two story brick dwelling, located on the north side of Farragut Road, between East 92nd Street and Remsen Avenues, and numbered 9031 Farragut Road, as described above, and there search for and seize all property specified.

Sworn to before me this
24th. day of October 1966

United States Commissioner
Eastern District of New York

A TRUE COPY:

SEARCH WARRANT

United States District Court

FOR THE

EASTERN DISTRICT OF NEW YORK

Commissioner's Docket No. 16
Case No.

UNITED STATES OF AMERICA V. a garage at the premises 43-02 South Conduit Blvd. Queens, New York	SEARCH WARRANT

To: Special Agents of the Federal Bureau of Investigation

Affidavit having been made before me by Paul Stapleton, Special Agent Federal Bureau of Investigation

that he has reason to believe that on the premises known as

in the Eastern District of New York

there is now being concealed certain property, namely a quantity of boxes of ladies and childrens wearing apparel valued at about Thirty Six Thousand Dollars ($36,000.00).

that there are goods stolen from the Bassinger, Incorporated of Long Island, New York, while moving in interstate commerce in a motortruck owned by one Max Miller Trucking Company, and said goods were stolen on or about August 20, 1968 in violation of Title 18, United States Code, Section 659.

and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the premises above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the premises named for the property specified, serving this warrant and making the search in the daytime — in the nighttime as I find reasonable cause has been established therefor — and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 24th day of October 19 68

Gerard T. McEniry, Special Assistant
Department of Justice
U.S. Courthouse, Brooklyn

[signature]
U.S. Commissioner

Search Warrant

RETURN

I received the attached search warrant October 24, 1968, and have executed it as follows:

On October 25, 1968 at 9:05 o'clock A.M. I searched the person (the premises) named in the warrant and

left a copy of the warrant with at the place of search

together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

1 small piece of cardboard to which is attached a Rusatogs, Inc. label bearing invoice # 68.812, account # 1.078, your order # 3707666.

1 small piece of cardobard bearing partial lettering of Rusatogs.

2 small pieces of cardboard bearing partial labels

1 clear plastic collar holder

1 straight pin

This inventory was made in the presence of Edward P. Doherty, William E. Kelly and Francis E. Dwyer

I swear that this inventory is a true and detailed account of all the property taken by me on the warrant.

Subscribed and sworn to and returned before me this 1st day of November, 1968.

Search Warrant

FILED

FEB 10 1969

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

AFFIDAVIT

T. 18, U.S.C. § 659

a garage at the premises
245-02 South Conduit Blvd.
Queens, New York

EASTERN DISTRICT OF NEW YORK, SS:

Paul Stapleton, being duly sworn deposes and says that he is a Special Agent of the Federal Bureau of Investigation duly appointed and acting as such.

Your deponent has reason to believe that in a certain garage, part of and attached to a two story building, located at the premises of 245-02 So. Conduit Blvd., Queens, N.Y within the Eastern District of New York, there is being kept and concealed a quantity of wearing apparel which was part of the contents of a truck operated by the Max Miller Trucking Company, 2214 37th Avenue, Long Island City, New York, which truck and contents were stolen in an armed robbery, in violation of Title 18, United States Code, Section 659, on August 20, 1968, in the vicinity of West 36th Street, between 10th and 11th Avenues, New York City, New York, and which were part of interstate shipments of the said wearing apparel from Russtogs, Incorporated, 27-11 49th Avenue, Long Island City, New York, to various consignees within and outside of the State of New York.

The grounds for my belief are as follows:

1. Allen Magid informed me of the following:

Search Warrant

first in the latter part of August 1968, Allen Magid had a conversation with one Robert Viggiano concerning a "Mustang load" which the said Viggiano had just "purchased" for Twelve Thousand Dollars ($12,000.00) saying that he wanted to sell it for Seventeen Thousand Dollars ($17,000.00) Further that on or about September 3, 1968, Vic Orena told the said Magid that "the load" was being moved from Viggiano's "spot" to another location. Thereafter, on or about September 20, 1968, Orena gave the said Magid a key to the above described garage where "the load" was stored and told Magid to use the key to show the merchandise to prospective buyers. Thereafter, Magid entered the garage, most recently on October 22, 1968, and saw therein, a quantity of boxes bearing "Mustang" labels, some of which bore out of state addresses, and a quantity of ladies and childrens wearing apparel, having Mustang labels, and opened Mustang boxes.

2. The said Magid has given me the above described key

3. Investigation by Agents of the Federal Bureau of Investigation has revealed that the above described truck and contents were reported, by the Max Wasser Trucking Company to have been stolen on August 20, 1968. The contents of the truck as described in the invoices, were ladies and childrens wearing apparel, consigned from Mustangs, Incorporated, Long Island City, New York, to various consignees in Omaha, Nebraska; Fairmont, West Virginia; Pittsburgh, Pennsylvania, and other points within and outside of the State of New York. The value of the various interstate shipments as stated on the invoices, which I have examined, was approximately Thirty Six Thousand Dollars ($36,000.00).

Search Warrant

WHEREFORE, your deponent respectfully prays that a Search Warrant issue authorizing your deponent, and other Special Agents of the Federal Bureau of Investigation to enter in the daytime, with the proper assistance, the premises of a garage at the premises 249-02 so. Conduit Blvd., Queens, N.Y., as described above, and there search for and seize all property specified.

Sworn to before me this
24th day of October 1968

Paul Stapleton

United States Commissioner
Eastern District of New York

A TRUE COPY:

Stanley Warren

9 & 0m